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Cibao Meat Products, Inc. and Local 169, UNITE-HERE, AFL-CIO. Case 2-CA-36943

March 6, 2007

DECISION AND ORDER

BY MEMBERS SCHAUMBER, KIRSANOW, AND WALSH

On September 25, 2006, Administrative Law Judge Eleanor MacDonald issued the attached decision. The General Counsel, the Respondent, and the Charging Party each filed exceptions and supporting briefs. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,¹ findings,² and conclusions (as amended below), to amend the remedy,³ and to adopt the recommended Order.

¹ The Respondent has excepted to certain of the judge's evidentiary rulings. Specifically, the judge allowed the General Counsel to introduce into evidence the minutes of the September 30, 2004 meeting of the UNITE Washable Clothing, Sportswear and Allied Industries Fund Board of Trustees and two related Resolution and Merger Agreements. The Respondent argues that the judge erred in admitting these documents because they should have been produced before the hearing pursuant to a subpoena it served on the Charging Party. We find no merit in the Respondent's exception. "[T]he Board affirms an evidentiary ruling of an administrative law judge unless that ruling constitutes an abuse of discretion." *Aladdin Gaming, LLC*, 345 NLRB No. 41, slip op. at 3-4 (2005). Here, there was no abuse of discretion in allowing the General Counsel to introduce relevant documents even assuming, arguendo, that the Charging Party improperly failed to produce them. Moreover, the Respondent did not request additional time or other relief when the documents were introduced at the hearing. For all these reasons, the Respondent has failed to show that the judge's ruling resulted in prejudice or a denial of due process.

² The Respondent has also excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ We adopt the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act by failing to make payments to the UNITE Washable Clothing, Sportswear and Allied Industries Funds and their successors, UNITE National Insurance Fund and UNITE National Retirement Fund, for its employees' coverage after March 1, 2005. The judge also found that the parties reached a lawful impasse in bargaining on February 10, 2006, and thus limited the remedy period to that date. The General Counsel has excepted to the judge's finding and argues that the issue of whether the parties ever reached a good-faith impasse, and the amount of contributions owed, should be resolved in a compliance proceeding. We find merit in the General Counsel's exception. At the hearing, the judge received some limited evidence regarding a pos-

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) by failing, since March 1, 2005, to make contributions to the UNITE Washable Clothing, Sportswear and Allied Industries Funds and their successors, UNITE National Insurance Fund and UNITE National Retirement Fund, as required by the parties' March 15, 2001 to February 28, 2005 collective-bargaining agreement, we shall order the Respondent to make all required contributions that have not been made since March 1, 2005, including any additional amounts due to the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 (1979).⁴ We shall also order the Respondent to reimburse unit employees for any expenses resulting from its failure to make such required payments or contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enf'd. 661 F.2d 940 (9th Cir. 1981). Such amounts are to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enf'd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Cibao Meat Products, Inc., Bronx, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. March 6, 2007

sible impasse, and then specifically stated that she was not trying an impasse case, effectively precluding further evidence on the issue. We therefore do not pass on the judge's finding of impasse and find that any such determination is best left to compliance proceedings. See *Springfield Transit Management, Inc.*, 281 NLRB 72 fn. 3 (1986). Accordingly, we have amended the remedy (and, correspondingly, par. 2 of the judge's Conclusions of Law) to remove the time limit imposed by the judge.

⁴ To the extent that an employee has made personal contributions to a fund that were accepted by the fund in lieu of the Respondent's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

Peter C. Schaumber,	Member
Peter N. Kirsanow,	Member
Dennis P. Walsh,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Rhonda Gottlieb, Esq., for the General Counsel.
Irene Donna Thomas, Esq. (Thomas & Associates), of Brooklyn, New York, for the Respondent.
Stuart Lichten, Esq. (Schwartz, Lichten & Bright, P.C.), of New York, New York, for the Union.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was heard in New York, New York, on June 5, 2006. The Complaint alleges that Respondent, in violation of Section 8 (a) (1) and (5) of the Act, has unilaterally ceased making payments to the Union's pension and health and welfare plans. The Respondent denies that it has engaged in any violation of the Act and it asserts that Section 302 of the Taft-Hartley Act prohibits the payments.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties on August 18, 2006, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with an office and place of business in the Bronx, New York, is engaged in the processing and non-retail sale of meat and related products. Annually, Respondent sells and ships from its Bronx, New York, facility goods valued in excess of \$50,000 directly to points outside the State of New York. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2 (2), (6) and (7) of the Act and that Local 169, UNITE-HERE, AFL-CIO, is a labor organization within the meaning of Section 2 (5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The parties agree that the following employees of Respondent constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act:

All full-time and regular part-time production employees, mechanics and drivers, employed by the Employer at and out of its facility located at 630 St. Ann's Avenue, Bronx, New York. Excluded are all other employees including office clerical employees, sales persons, confidential employees and

guards, professional employees, and supervisors as defined by the Act.

The Respondent and the Union were parties to a collective-bargaining agreement with a term from March 15, 2001 to February 28, 2005. Articles 18 and 19 of the agreement, respectively, required Respondent to make monthly contributions to the Amalgamated Washable Clothing, Sportswear & Allied Industries Fund Pension Plan and to the Health and Welfare Plan. (hereafter the Washable Fund) Respondent admits that since March 9, 2005 it has failed to make payments to either of these plans or these plans' successors. The last payments covered the period ending February 28, 2005.

It is undisputed that on June 15, 2003 the name of the Washable Fund was changed to UNITE Washable Clothing, Sportswear and Allied Industries Fund. (hereafter the UNITE Washable Fund) Respondent continued to make its monthly contributions to the UNITE Washable Fund after the name change. On April 1, 2005 the UNITE Washable Fund merged with the UNITE National Insurance Fund and the UNITE National Retirement Fund, however the UNITE Washable Fund continued to maintain an independent existence until a date not specified in the record.

B. Relevant Documentary Evidence

The relevant language of the collective-bargaining agreement is as follows:

Article 18. Pension Benefits

18.1 The Employer shall be a contributing employer to the Amalgamated Washable Clothing, Sportswear & Allied Industries Fund – The Pension Plan of Local 169; the Employer shall receive copies of the current trust agreement and any amendments as adopted. Employees shall receive benefits of the Pension Plan of the Amalgamated Washable Clothing, Sportswear and Allied Industries Fund as described in the Summary Plan Description of the Pension Plan of Local 169 and/or as established by the Trustees.

The Employer shall contribute twenty dollars (\$20.00) per month per each non-probationary employee to the Pension Plan

The Employer shall, at the request of the Union, allow the Union or its representative to examine and copy the Employer's payroll records of bargaining unit employees as to insure compliance with this section of the Agreement.

Article 19. Insurance Benefits

19.1 The Employer shall be a contributing employer to the Amalgamated Washable Clothing, Sportswear & Allied Industries Fund – Health and Welfare Plan; the Employer shall receive copies of the current trust agreement and any amendments as adopted. All full-time employees with the years of service as defined in Section 19.2 and 19.3 . . . shall . . . receive all the benefits as described in the Amalgamated Washable Clothing, Sportswear and Allied Industries Fund's Summary Plan Description of the Health and Welfare Plan and/or established by the Trustees. . . (sic)

19.2 All full time employees who have been employed for one year shall receive individual health insurance coverage. The Employer shall contribute one hundred and seventy dollars (\$170.00) per month for each employee to the Fund.

19.3 All eligible full time employees who have been employed for two years shall receive the family health insurance coverage. The Employer shall contribute two hundred dollars (\$200.00) per month for each eligible employee to the Fund.

19.4 The Employer shall, at the request of the Union, allow the Union or its representative to examine and copy the Employer's payroll records of employees as to insure compliance with this section of the Agreement.

The Washable Pension Plan and the Health and Welfare Plan were governed by a single document entitled Amalgamated Washable Clothing, Sportswear and Allied Industries Fund Agreement and Declaration of Trust as amended January 1, 2000. The relevant portions of this document are as follows:

The Trustees

4. B . . . The Trustees shall have the right at any time and from time to time to modify, change, amend or terminate to any extent any or all of the terms and provisions of the Plan . . .

The Declaration of Trust was amended on June 15, 2003 to change the name of the Fund to The UNITE Washable Clothing, Sportswear and Allied Industries Fund. The 2003 Declaration retained the language of 4B quoted above concerning the powers of the trustees to modify, change, amend or terminate to any extent the provisions of the plan.

At a meeting of the UNITE Washable Fund trustees held on September 30, 2004 the trustees discussed a proposed merger with the UNITE National Insurance Fund and the UNITE National Retirement Fund.¹ The trustees discussed actuarial reports showing that if the Washable Fund did not merge with the National Fund the existing employer contribution rates would not be sufficient to maintain the level of benefits. However, the proposed merger would protect the current level of benefits to employees and would protect fund assets against market fluctuations and provide cheaper administrative costs. The trustees then resolved to accept the merger offer of the UNITE National Insurance Fund and the UNITE National Retirement Fund with the UNITE Washable Fund.

On March 30, 2005 the trustees of the UNITE Washable Fund and the UNITE National Fund entered into a merger agreement. The resolution of the trustees provides that the merger would become effective as soon as various required governmental approvals were obtained.

On June 7, 2005 the administrator for the UNITE National Fund sent a letter to Respondent stating that the Washable Fund and the UNITE National Fund had merged effective April 1, 2005 and providing a new address for the remittance of employer contributions of health and pension benefits.

¹ The trustees heard a report from the Washable Fund's accountants about delays in gaining access to payroll data for an ongoing audit program.

C. The Facts

Lutzi Vieluf Isidor is the acting president of Respondent. Isidor oversees the day-to-day operations of the business. She is responsible for maintaining the payroll records and other records of the company. In addition, during the time that Respondent was contributing to the Washable and UNITE Funds, Isidor mailed the monthly checks and employee information sheets to the Funds. Isidor testified that in September 2004 the Union sent an auditor to examine the company's books. Before the auditor came to the premises he had asked for certain records which Isidor believed did not pertain to payroll. Isidor testified that she provided the auditor with payroll records only. While the auditor was at the company he told Isidor that the figures for employee Andre Pulmario did not make any sense and thought that Pulmario was not getting the correct amount of pay. Isidor believed that the pay formula for the employee was correct and she so informed the auditor.

In December 2004 a trustee of the UNITE Funds filed a complaint against Cibao in the United States District Court, Southern District of New York, alleging, *inter alia*, that "The Employer refused to provide all payroll documents, including weekly payroll reports, quarterly tax filings, and year-end reports."² The company's answer in that proceeding admitted that the company did not provide quarterly payroll tax reports and year end reports to the auditor. The Union discontinued the proceeding with prejudice on August 1, 2005.

Isidor testified that after the auditor requested records she thought did not pertain to benefit fund payments she "decided there was something else there." Isidor did not want the union auditors to have anything to do with Cibao because "it should be employee records that they ask for and nothing else." Isidor testified that this was the reason the company wanted to discontinue the health and welfare payments to the Union funds.³

Alejandro Fuentes is the assistant manager and a business agent for Local 169, UNITE. He is the chief negotiator for the unit of Cibao employees. Fuentes recalled that he began negotiations with Cibao for a successor collective-bargaining agreement in January 2005. Heinz Vieluf, the owner and president of Cibao, conducted the negotiations on behalf of Respondent.⁴ Fuentes testified that at the conclusion of an early bargaining session he asked Vieluf to extend the contract beyond its expiration date. Vieluf replied that Fuentes should put his proposal in writing. Before Fuentes could send such a written proposal to Vieluf he received a letter dated February 15, 2005 from Vieluf. The letter stated:

² *William Towne v. Cibao Meat Products, Inc.*, 04 CV 9916.

³ Respondent's Brief quotes from and attaches a "Declaration" submitted by Isidor in the district court proceeding. This document was not offered during the instant proceeding. Isidor was called by Respondent and she testified at the hearing. No reason has been shown why the declaration was not offered at that time. Had it been offered and admitted General Counsel would have had an opportunity to cross-examine Isidor on its contents. Respondent's contention that the document was incorporated by reference into an exhibit in the record is without merit. I shall not rely upon Isidor's declaration attached to Respondent's Brief.

⁴ At the time of the instant hearing Vieluf was no longer president of the company but he was still an owner.

On Friday, February 11, 2005, we met ... for contract negotiations. After the meeting, you asked if Cibao would be interested in extending the contract until the parties reached agreement on a new contract. . . .

Be advised that after careful consideration, Cibao will not agree to extend the current agreement past February 28, 2005.

Fuentes did not recall that Respondent ever proposed to discontinue payments to the health and welfare and pension funds as of the expiration date of the collective-bargaining agreement.

Heinz Vieluf testified that in January 2005 the Union gave Respondent its demands in the negotiations. Vieluf testified that Respondent's attorney said that the company wanted to stop paying the employee benefit funds when the contract terminated because it was looking at other plans. At a negotiation session on February 11, 2005, according to Vieluf, Respondent gave the Union a counterproposal and stated that the company was planning its own insurance benefit for the employees. The company said it would discontinue the fund benefits at the end of the contract term. At the end of the February meeting Fuentes asked whether Vieluf would extend the contract. Vieluf asked for a proposal in writing for the next meeting. A few days later Vieluf sent Fuentes the February 15 letter quoted above stating that the contract would be terminated.

The Union and Respondent continued their negotiations throughout 2005 and until mid- February 2006. The correspondence introduced into evidence by Respondent shows that on February 3, 2006 Respondent asserted in writing that the negotiations had reached an impasse.⁵ The Union disputed this assertion in a letter dated February 7, 2006. In this letter the Union asked for clarification of the employer's wage proposal and stated its wish to discuss the company's severance proposal. The Union quoted Respondent's February 3 letter to the effect that Respondent "would seriously consider the union's health and welfare plan *so long as* the officers/trustees of the health and welfare plan become signatories to the collective bargaining agreement." (emphasis in original) The Union stated a belief that this condition requested by the company was beyond the Union's control. The Union agreed to changes proposed by the company concerning various articles in the existing contract relating to seniority, permissive leaves and sick leave. The Union's letter stated a desire to explore the company's proposal on severance pay and it closed with a request to meet at an early date to discuss the parties' "differences" further.

Counsel for the Respondent replied by letter of February 8, 2006 clarifying its wage proposal, reaffirming its position on health insurance and expressing frustration that no agreement had been reached on severance pay. The letter requested that the Union provide a list of "differences" regarding severance pay. Counsel's letter closed by stating that in the absence of new proposals from the Union it would consider as a "final offer" its written proposals of January 30 as clarified on February 3 and modified on February 8. Counsel stated that if she did not have a response by the next day the company would

assume that the Union had no further proposals and "we will then make plans to implement our final offer."

The Union replied on February 9, 2006 listing various "differences." With respect to the union security clause of the existing contract the Union now proposed an agency fee shop and it proposed a change to the time period stated in the union security clause. The Union continued its proposal to continue the current pension plan but stated that it was willing to consider a different plan. The letter discussed what the Union believed to be Respondent's misapprehension about the current pension plan. The Union asked for more information about the company's proposal for a severance plan, including questions about the organization of the plan, about what kinds of accounts would be established and their tax consequences and the costs of administration. The Union pointed out that it could not respond to the company's proposal that it "will provide health insurance." The Union asked for details about what kind of health insurance would be provided, what the carrier and administrator would be and what benefits would be provided. The Union asked for a summary of the suggested insurance plan. The Union agreed to abandon its request for a cash raise and agreed to the employer's proposal for percentage increases; the Union proposed annual 4% increases. The Union asked for an updated version of the company's latest offer and stated its belief that the parties were not at impasse. Finally, the Union requested further bargaining sessions.

Counsel for Respondent replied by letter of February 10 rejecting the Union's proposal for an agency shop and stating that it would not agree to any proposal requiring employees to pay any sums to the Union. The letter went on to state that "Cibao is not interested in contributing to [the pension plan] where the trustees would have access to our books and records." The letter answered some questions about the proposed severance plan and stated that with respect to health insurance the company had already provided a summary plan description to the Union in April 2005. The letter rejected the Union's demand for a 4% wage increase and stated that on February 2, 2006 the company had set a limit of 3.5%. The letter stated that the Union has "not made a single contract proposal that would serve as an incentive to increase wages by 4% to all employees, including those employees who have received a raise in the minimum wage. We reject the offer." Respondent's letter closed by stating that the Union had not shown that "the parties are not at impasse."

The Union did not respond to this letter and did not request a meeting after receipt of the letter. As far as the instant record shows, there were no further exchanges of proposals and no more negotiations between the parties. No collective-bargaining agreement was reached. Respondent has not implemented its "final offer".

D. Discussion and Conclusions

The Respondent does not maintain that as a general rule an employer is privileged unilaterally to cease making payments to health and pension funds after the expiration date of the contract. Respondent does not argue that the language of the collective-bargaining agreement waives the continuance of payments to the funds. Nor does Respondent urge that the Union

⁵ The February 3 letter was not offered into evidence but it is quoted in the February 7 letter which is in evidence.

consented to the unilateral change during the negotiations. Respondent's opening statement took the position that the Respondent could lawfully declare impasse in February 2005. Further, Respondent's Brief urges that the company "faced exigencies, based upon an unlawful abuse of authority by the Funds, that allowed implementation of changes to the CBA before the parties reached an overall impasse on the entire collective-bargaining agreement."

Fuentes did not recall any company proposal to discontinue payments to the employee benefit funds as of the expiration of the contract. I note that Fuentes did not testify that the Respondent's representatives had not made any such proposals. Based on the uncontradicted testimony of Vieluf I find that in January 2005 Respondent's attorney informed the Union that the company wanted to stop paying the funds and in February 2005 the company said it would discontinue the fund benefits at the end of the contract term. There is no testimony that Respondent during the year of negotiations that followed February 2005 ever informed the Union that it had ceased making the payments. None of the correspondence introduced into evidence contains any statement by Respondent that it had ceased making the benefit fund payments. There is no evidence in the record that Respondent made any other changes in its employees' terms and conditions of employment.

The testimony of Isidor shows that she became upset when the Union auditor questioned whether a unit employee was being paid properly. She refused to permit the Union auditor to see the quarterly and yearly employee tax filings. Isidor did not believe it was the function of the Union auditor to determine whether the employees' pay was being calculated correctly. In fact, the Brief filed by Counsel for Respondent makes clear that Isidor feared that the auditor would inform the Union if he found hourly wage violations.⁶ Isidor testified that because the auditor asked for records that would have permitted him to ascertain whether employees were being paid correctly the Respondent no longer wished to make health and pension payments to Union funds. Finally, during the negotiations Counsel for Respondent informed the Union that the company did not want to contribute to a fund "where the trustees would have access to our books and records."

It is well-established that an employer may not make unilateral changes in matters which are mandatory subjects of bargaining. *NLRB v. Katz*, 369 U.S. 736 (1962). An employer may not impose unilateral alterations in benefits and benefit plans at the expiration of a contract absent the existence of a good faith impasse. *Taft Broadcasting Co.*, 163 NLRB 475 (1967).

There is no evidence in the record that the parties had reached impasse in February 2005 after the first two bargaining sessions. The facts set forth above show that negotiations had just begun and the parties had merely exchanged initial proposals. Indeed, it was only on February 3, 2006 that Respondent began mentioning a possible impasse in the negotiations. Thus, I reject the position voiced in the opening statement of Counsel

for Respondent that the Respondent could lawfully declare impasse in February 2005.

Nor can it be said that the Union waived bargaining over the cessation of health insurance and pension fund payments. The Board has clearly set forth the applicable law in *Intermountain Rural Electric Assn.*, 305 NLRB 783, 786 (1991):

... In a nonnegotiation setting, it is incumbent upon a union to request bargaining when it receives sufficient notice to permit meaningful bargaining over an employer's proposal to change terms or conditions of employment. ...

When parties are engaged in negotiations for a collective-bargaining agreement, however, their obligations are somewhat different. Because the parties are in fact bargaining on various proposals, there is no need for additional requests for bargaining on those proposals. During negotiations, a union must clearly intend, express, and manifest a conscious relinquishment of its right to bargain before it will be deemed to have waived its bargaining rights. Absent such manifestation by the union, an employer must not only give notice and an opportunity to bargain, but also must refrain from implementation unless and until impasse is reached on negotiations as a whole. (footnotes omitted)

The Board's discussion stated an exception to this rule based on "an economic 'business emergency' that requires prompt action" citing *Winn-Dixie Stores*, 243 NLRB 972 at 974 and fn. 9 (1979). Respondent herein does not cite an economic business emergency. Respondent cites only the Union auditor's wish to see quarterly and year end employee tax filings and the fear that the auditor would report to the Union if he found improper wage payments to unit employees. An auditor's request to see documents relating to wages paid to employees is not an emergency privileging an employer to cease making payments to health and pension funds.

Respondent's argument that the auditor's request was "illegitimate" because the purpose was to advance union goals or to acquire information for union goals is a misreading of the case relied on by Respondent. In *Central States v. Central Transport, Inc.*, 472 U.S. 559, 571, fn. 12 (1985), the Supreme Court noted that an audit request would be illegitimate if it were "to acquire information about the employers to advance union goals." The meaning of this is clear. In the cited case the employer feared that the auditors would gain information about employees who were not covered by the pension plan and that the union would use the information to organize non-unit employees. The "union goals" referred to by the Court were organizational goals as opposed to representational goals related to unit employees. In the instant case the auditor did not seek information relating to non-unit employees and the only goals which could have been furthered by his inquiries relate directly to the wages of unit employees. Respondent equates its failure to continue payments to the employee benefit funds with a necessity to avoid "unlawful abuse" of its books and records. Respondent's Brief makes clear that the potential "abuse" consisted of the auditor's possible notification to the Union that the unit employees were not being paid their proper wages. Such a notification would not have been an abuse. Indeed, it is hard to think of a more proper function for a union than insuring that

⁶ Respondent has not made any legal argument to show why such an action on the part of the auditor would have been improper.

unit employees are being paid their proper wages. Respondent's argument on this issue is without merit.

Respondent also asserts that the parties reached impasse in February 2006. Since the company ceased making payments to the funds after February 2005 this argument goes to the remedy to be ordered herein.

The Board has commented that *Taft Broadcasting*, supra, "sets forth the standards for determining whether parties have exhausted the prospects of concluding an agreement and a bargaining impasse exists. Factors such as the parties' bargaining history, their good faith, the length of time spent in negotiations, the importance of the issues about which the parties disagree, and the parties' contemporaneous understanding of the status of negotiations are all relevant parts of the analysis." *Intermountain Rural Electric Assn.*, supra at 788.

The evidence summarized above shows that the parties had engaged in lengthy negotiations with numerous exchanges of proposals. There had been significant movement by the Union in its last letter to Respondent where it proposed changes to the union security clause and agreed to change its wage demand from a cash raise to a 4% percentage increase. The Respondent's final letter of February 10 restated its longstanding positions on various issues and provided answers to the questions asked by the Union in its prior letter. Significantly, in discussing the wage issue Respondent remarked that the Union had failed to offer "an incentive" to support its new demand for a 4% wage increase. This was a clear and explicit invitation to the Union to discuss its wage proposal and explore what "incentive" might result in an agreement on wages. The subject of wages is of paramount importance in reaching a collective-bargaining agreement. Yet, the Union did not reply to this letter and did not take up the invitation to discuss "an incentive" for a wage increase. I conclude from the failure of the Union to explore this opening that the Union had nothing more to offer or discuss and that it was convinced that further discussion would be futile. Based on this discussion I find that the parties were indeed at impasse on February 10, 2006.

The General Counsel maintains that a lawful impasse could not exist in February 2006 because there was a serious unremedied unfair labor practice. In *Titan Tire Corp.*, 333 NLRB 1156, 1158-1159 (2001), the Board summarized the applicable case law and observed that while a lawful impasse cannot be reached in the presence of unremedied unfair labor practices,

not all unremedied unfair labor practices committed during negotiations will give rise to the conclusion that impasse was declared improperly, thus precluding unilateral changes. *Alwyn Mfg. Co.*, 326 NLRB 646, 688 (1998), enf'd. 192 F. 3d 133 (D.C. Cir. 1999). Only 'serious unremedied unfair labor practices that [a]ffect the negotiations' will taint the asserted impasse. *Id.*, quoting *Noel Corp.*, 315 NLRB 905, 911 (1994).

The Board went on to observe that the "central question" is whether the employer's unlawful conduct detrimentally affected the negotiations and contributed to the deadlock. The Board sought to answer the question whether the unfair labor practice increased friction at the bargaining table and moved

the baseline for negotiations thus making it harder for the parties to come to an agreement. The instant record does not reveal whether the unilateral cessation of payments to the employee benefit funds increased friction at the bargaining table. Although the parties spent a lot of time and energy discussing the employer's proposals to substitute its own plans for the Union sponsored plans this would normally have occurred even in the absence of unilateral action. No specific evidence of friction due to the unilateral action was introduced during the course of the hearing. As to whether the unilateral action moved the baseline for negotiations there was also no evidence introduced on this issue. The testimony and correspondence in the record do not contain any allusion to the unilateral action or its effects on the negotiation process. Thus, I cannot find on the record before me that Respondent's unremedied unfair labor practice precluded a finding of impasse on February 10, 2006.

Respondent urges that Section 302 of the LMRA prohibits the payment of health and pension contributions to the UNITE National Funds. Section 302 (a) (2) prohibits an employer from paying money to a labor organization except, as set forth in 302 (c) (5) (A), where the payment is held in trust for medical and pension purposes, and (B), "the detailed basis on which such payments are to be made is specified in a written agreement with the employer. . . ." Respondent argues that because the collective-bargaining agreement referred to the Washable Funds by name it would be illegal for it to continue contributions to the National Fund into which the Washable Fund was merged. Respondent cites *Moglia v. Geoghegan*, 403 F. 2d 110 (2nd Cir. 1968), where the court held that the widow of a union member could not collect his pension because his employer had never executed "a written collective-bargaining agreement or any other written agreement" with the union. 403 F.2d at 115. None of the holdings or dicta in the cited decision applies to the instant case. It is uncontroverted that the Respondent was a party to a written collective-bargaining with the Union and that it lawfully made contributions to employee benefit funds for a number of years. The requirement of a written agreement is to satisfy the statutory aim that employer contributions are for a proper purpose and that benefits reach only the proper parties, and to prevent employers from tampering with the loyalty of union officials and to prevent union officials from extorting tribute from employers. *National Leadburners Health & Welfare v. O.G. Kelley*, 129 F.3d 372, 375 (6th Cir. 1997). As the Sixth Circuit pointed out, it has frequently been held that an employer may be required to remit contributions to employee funds where the employer is bound by the negotiations of an employer association even where the employer has not signed the actual agreement. Indeed, an employer-member of a multi-employer association is bound by the association's written agreement to contribute to an employee benefit fund where the association had no written authorization from the member and the employer-member never signed the agreement. *Trustees of U.I.U. Health & Welfare Fund v. N.Y. Flame Proofing Co.*, 828 F.2d 79 (2nd Cir. 1987).

The collective-bargaining agreement quoted above states that the Respondent shall contribute to the Washable Pension Plan and the Health and Welfare Plan and that the employees shall

receive benefits as described in the "Summary Plan Description . . . and/or as established by the Trustees." This contract language gave the trustees wide latitude to determine benefits for the covered employees. In addition, the Agreement and Declaration of Trust which governed both benefit plans gave the trustees the "right at any time and from time to time to modify, change, amend or terminate to any extent any or all of the terms and provisions of the Plan." The evidence shows that the Trustees used their powers to change the name of the Funds to the UNITE Washable Fund in 2003 and to merge the Fund with the UNITE National Funds in 2005. Both of these actions were authorized by the broad language of the Agreement and Declaration of Trust. The language and the purpose of Section 302 were satisfied by the existence of a written agreement between Respondent and the Union herein which specified that employees shall receive benefits "as established by the Trustees."

CONCLUSIONS OF LAW

1. Local 169, UNITE-HERE, AFL-CIO, is the exclusive bargaining representative of the employees of Respondent in the following appropriate unit:

All full-time and regular part-time production employees, mechanics and drivers, employed by the Employer at and out of its facility located at 630 St. Ann's Avenue, Bronx, New York. Excluded are all other employees including office clerical employees, sales persons, confidential employees and guards, professional employees, and supervisors as defined by the Act.

2. By failing to make payments to the UNITE Washable Clothing, Sportswear and Allied Industries Fund and its successor UNITE National Insurance Fund and UNITE National Retirement Fund for its employees' coverage from March 1, 2005 until February 10, 2006, Respondent has violated Section 8 (a) (1) and (5) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent must make whole the UNITE Washable Clothing, Sportswear and Allied Industries Fund and its successor UNITE National Insurance Fund and UNITE National Retirement Fund for its failure to make contributions covering the period from March 1, 2005 until February 10, 2006, including paying any additional amounts applicable to such delinquent payments in accordance with *Merryweather Optical Co.* 240 NLRB 1213, 1216 (1979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure, if any, to make such required payments or contributions, as set forth in *Kraft Plumbing and Heating*, 252 NLRB 891 fn. 2(1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷

⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the

ORDER

The Respondent, Cibao Meat Products, Inc., Bronx, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Making unilateral changes in terms and conditions of employment by discontinuing payments to its employees' benefit funds.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole the UNITE Washable Clothing, Sportswear and Allied Industries Fund and its successor UNITE National Insurance Fund and UNITE National Retirement Fund in the manner set forth in the Remedy section of this decision.

(b) Make whole the employees for any expenses, if any, ensuing from its failure to make required payments to the Funds.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in the Bronx, New York, copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 1, 2005.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., September 25, 2006.

Board and all objections to them shall be deemed waived for all purposes.

⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT unilaterally discontinue payments to your health and welfare and pension funds.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole the UNITE Washable Clothing, Sportswear and Allied Industries Fund and its successor UNITE National Insurance Fund and UNITE National Retirement Fund for the payments we unlawfully failed to remit.

WE WILL make our employees whole for any expenses, if any, resulting from our failure to make required payments to the funds.

CIBAO MEAT PRODUCTS, INC.